3 TWO SQUARE SDN BHD v. PERBADANAN PENGURUSAN 3 TWO SQUARE & ORS; YONG SHANG MING (THIRD PARTY)

HIGH COURT MALAYA, KUALA LUMPUR
AZIZUL AZMI ADNAN J
[CIVIL SUIT NO: 22NCVC-586-10-2013]
22 JANUARY 2018

LAND LAW: *Strata title – Management corporation – Maintenance and management of building – Mandatory injunction to compel management corporation to maintain facilities of property – Whether facilities formed part of common property – Whether facilities exclusively benefited developer – Whether management corporation misused sinking fund – Whether sinking fund would only be utilised pursuant to special resolution of management corporation – Whether council members of management corporation could be made personally liable for breaches of duty by management corporation – Whether council members in breach of statutory duty – Whether defendants' defence of estoppel could succeed*

The plaintiff 3 Two Square Sdn Bhd, was the developer of a commercial development ('3TwoSquare'). The first defendant, Perbadanan Pengurusan 3TwoSquare, was the management corporation for 3TwoSquare ('management corporation'), established pursuant to the Strata Titles Act 1985. The matter of dispute in the present case related to the maintenance of certain areas comprised within 3TwoSquare. The plaintiff contended that the responsibility for the maintenance of these areas and facilities laid with the management corporation. These areas and facilities included the cooling tower located on the roof of Block F of 3TwoSquare ('Crest Tower'), the toilets and lifts located in Crest Tower and the basement carpark. The plaintiff retained the title to all the parcels in Crest Tower, while the remainder of the parcels in 3TwoSquare had been sold. The cooling tower was part of a centralised air-conditioning system employed for Crest Tower. The plaintiff sought a mandatory injunction to compel the management corporation to maintain such property on the basis that they were common properties of 3TwoSquare. The plaintiff sought, *inter alia*, damages for the costs that it had expended in undertaking the maintenance when the management corporation failed to do so. The plaintiff also claimed that the sinking fund of the management corporation had been misused because a proper resolution of the management corporation had not been passed in order to pay for certain costs incurred. The second to the ninth defendants were council members of the management corporation whom the plaintiff sought to make personally liable for breaches of duty by the management corporation. In addition to contending that the council members were in breach of their statutory duties, the plaintiff claimed that they were in breach

of fiduciary duties owed by the council members to the plaintiff. On the contrary, the first to eighth defendants contended, *inter alia*, that (i) the cooling tower, the lifts and toilets in Crest Tower did not form part of the common property in 3TwoSquare, primarily because the benefit of these facilities accrued exclusively to the plaintiff and its tenants; and (ii) there was no legal requirement to obtain a special resolution of the management corporation in a general meeting before utilising the sinking fund. Further, the first to eighth defendants raised the defence of estoppel contending that, because the plaintiff had itself voluntarily undertaken the responsibility for maintaining the centralised air-conditioning system and the cleaning of the toilets in Crest Tower, the management corporation was thus discharged and absolved from its obligation to undertake the management and maintenance of such facilities.

Held (allowing plaintiff's claim in part):

(1) Based on a proper construction of s. 46 of the Strata Titles Act 1985, no special resolution was required for the use or application of the sinking fund. Although a special resolution is required to determine the portion of the contribution of the management fees that is to be applied to the special account, no special resolution is required in order for the funds in the special account to be used to defray expenses. Accordingly, the plaintiff's claim for the sums to be repaid to the management corporation was dismissed. (para 11)

(2) All the facilities located outside the parcels and which were capable of being used in common by more than one parcel owner to be common property. These included the cooling tower, toilets and lifts in Crest Tower. The management corporation was thus obligated to maintain such common property. (para 11)

(3) Based on an evaluation of the contemporaneous documentary evidence, the issue of the electricity charges and other maintenance costs associated with the centralised air-conditioning was still very much a live issue between the parties right up to the time the suit was commenced. For this reason, there was no question of the management corporation having been led by the plaintiff to believe that it was absolved from the responsibility for such charges. Therefore, the first to eighth defendants' defence of estoppel failed. The court therefore (i) ordered a mandatory injunction for the management corporation and its council members for the time being to undertake the maintenance and management of such common property; (ii) granted a declaration to the effect that the management corporation was obligated to maintain all common property at 3TwoSquare including, without limitation, the lifts, the toilets located in the lift lobbies of Crest Tower, the central cooling tower at Crest Tower and the common property located in the

carpark; and (iii) allowed the plaintiff's claim for special damages in connection with the costs incurred in maintaining the central cooling tower and the toilets in Crest Tower. (paras 11 & 53)

(4) Even though the council members owed a fiduciary duty to the management corporation and to the proprietors as a whole, this duty was not owed to any individual proprietor. The plaintiff's claim for breach of fiduciary duty against the defendants was thus dismissed. Further, on the facts, it was not proven that the defendants were personally liable to the plaintiff for the breach of statutory duties by the management corporation, therefore, the plaintiff's claim in this regard was dismissed accordingly. (para 11)

(5) A council member of a management corporation owes a fiduciary duty to act *bona fide* in the interests of the management corporation. This duty is owed to the management corporation and to the proprietors comprised in the development managed by the corporation. This fiduciary duty is not, however, owed to individual proprietors. Therefore, the plaintiff's claim against the second to the ninth defendants for breach of fiduciary duties failed on a point of law. (paras 84 & 89)

(6) The management corporation was in breach of its statutory duty to maintain the common property in accordance with s. 43(1)(a) of the Strata Titles Act 1985. No liability will arise in connection with the exercise of a duty or function of a management corporation by its council member, for as long the council member acts in good faith in what he or she considers to be in the best interests of the proprietors as a whole. On the facts, the court was not satisfied that liability laid against the council members personally for the failure by the management corporation to carry out its statutory duty to maintain the common property. There was insufficient evidence to show that the council members had acted other than in good faith for what they considered to be in the best interests of the proprietors as a whole. Accordingly, the plaintiff's claim to make the council members personally liable for the breach by the management corporation was dismissed. (paras 90, 91, 97 & 99)

Case(s) referred to:

2 Elizabeth Bay Road Pty Ltd v. The Owners – Strata Plan No 73943 [2014] NSWCA 409 ***(refd)***

3716724 Canada Inc. v. Carleton Condominium Corporation No 375 2016 ONCA 650 ***(refd)***

Alcatel-Lucent (Malaysia) Sdn Bhd v. Solid Investments Ltd & Another Appeal [2013] 2 CLJ 734 CA ***(refd)***

Crossco No 4 Unlimited and Others v. Jolan Ltd and Others [2011] EWHC 803 ***(refd)***

JMB Silverpark Sdn Bhd v. Silverpark Sdn Bhd & Anor [2012] 1 LNS 1082 HC ***(refd)***

Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v. Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor [2017] 4 CLJ 265 FC ***(refd)***

Nothman v. Barnet London Borough Council [1978] 1 WLR 220 ***(refd)***

Re Steel and the Conveyancing (Strata Titles) Act 1961 [1968] 88 WN Pt 1 NSW 467 ***(refd)***

Tengku Abdullah Ibni Sultan Abu Bakar & Ors v. Mohd Latiff Shah Mohd & Ors And Other Appeals [1997] 2 CLJ 607 CA ***(refd)***

Legislation referred to:

Building and Common Property (Maintenance and Management) Act 2007, s. 2

Strata Management Act 2013, s. 143(3), (4)(a)

Strata Titles Act 1985, ss. 4, 10(3), (4), 34(1)(b), 39(1), (2), (2A), (3), (4), 41(5)(ba), 43(1)(a), 46(a), (b), (c), (d), 55(2), 78, Second Schedule items 2, 5, 6

For the plaintiff - Celine Chelladurai, Jee Hock Hua & Elizah Adam; M/s Yip & Co

For the 1st - 8th defendants - Adrian Silvarajoo & Nik Abdul Matin Fawwaz; M/s Chambers of Firdaus

For the 9th defendant - VS Amirtha & Nabilah Muhamad Azmi; M/s Amirtha VS & Co

For the 3rd party - Christie Soosay Nathan & Nor Aqilah Ahmad Nasar; M/s Christie Soosay Nathan & Assocs

Reported by Sandra Gabriel

JUDGMENT

Azizul Azmi Adnan J:

Introduction

[1] The plaintiff in this case, 3 Two Square Sdn Bhd, was the developer of a commercial development in Petaling Jaya. In this judgment, I will refer to this development area as 3TwoSquare. The plaintiff is also the proprietor of parcels within 3TwoSquare, and this action was commenced by the plaintiff *qua* registered proprietor. The first defendant, Perbadanan Pengurusan 3 Two Square, is the management corporation for 3TwoSquare (the "management corporation"), established by operation of law pursuant to the Strata Titles Act 1985.

[2] Many disputes have arisen between the plaintiff and the management corporation in connection with 3TwoSquare. One of the disputes, which is subject matter of this case, relates to the maintenance of certain areas comprised within 3TwoSquare. The plaintiff contended that the responsibility for the maintenance of these areas and facilities lay with the management corporation. These areas and facilities include the cooling tower located on the roof of Block F of 3TwoSquare (which block I will refer to as "Crest Tower"), the toilets and lifts located in Crest Tower and the basement carpark. The cooling tower is part of a centralised air-conditioning system employed for Crest Tower.

[3] The plaintiff sought a mandatory injunction to compel the management corporation to maintain such property on the basis that they are common property of 3TwoSquare. It sought damages for the costs that it had expended in undertaking the maintenance when the management corporation failed to do so. It also sought damages for loss of rental arising from the management corporation's purported breaches. The plaintiff also claimed that the sinking fund of the management corporation had been misused because a proper resolution of the management corporation had not been passed in order to pay for certain costs incurred.

[4] The second to the ninth defendants are or were council members of the management corporation. The plaintiff sought to make them personally liable for what it contended were breaches of duty by the management corporation. In addition to contending that the council members were in breach of their statutory duties, the plaintiff claimed that they were in breach of fiduciary duties owed by the council members to the plaintiff.

[5] There are six blocks of shop and office lots in 3TwoSquare, with Crest Tower being the only high-rise block. The plaintiff retained the title to all the parcels in Crest Tower, while the remainder of the parcels in 3TwoSquare have been sold. Unlike Crest Tower, none of the other blocks has a centralised air-conditioning system. In addition, there are toilets on all or substantially all the floors in Crest Tower, most of which toilets are located outside the parcels in Crest Tower.

[6] The main contentions of the first to eighth defendants were (*inter alia*) that:

(a) the cooling tower, the lifts and toilets in Crest Tower do not form part of the common property in 3TwoSquare, primarily because the benefit of these facilities accrue exclusively to the plaintiff and its tenants;

(b) the plaintiff had agreed to contribute a higher management fee to the management corporation in order to defray the costs of the facilities under dispute or had agreed to bear the operating and maintenance costs of such facilities, and hence it was estopped from putting forward a position to the contrary;

(c) there was no legal requirement to obtain a special resolution of the management corporation in general meeting before utilising the sinking fund; and

(d) the flooding and ponding issues in the basement carpark were the result of defective works carried out in the construction of 3TwoSquare and not the result of any failure by the management corporation to properly maintain the common property.

[7] The ninth defendant, who was elected to the council of the first defendant at the material time, denied personal liability on the basis that he was never involved in any of the decisions undertaken by or on behalf of the management corporation.

[8] The first to eighth defendants commenced a third-party action against Mr Eric Yong Shang Ming to be indemnified by way of contribution in the event that liability was found against the council members personally. Mr Eric Yong is a director of the plaintiff and was appointed to the council of the management corporation as a representative of the plaintiff.

[9] The preceding paragraphs summarise the respective positions of the parties in order to aid the understanding of the reader on the background of the dispute between the parties. Further material facts will be introduced in the analysis of the issues later in this judgment.

[10] The plaintiff's action in this case was commenced prior to the coming into force of the Strata Management Act 2013 on 1 June 2015. As such, the views expressed in this judgment relate to the legal position at the time the acts complained of were committed. In particular, the effects of the 2013 Act have not been considered, save in respect of the issue of costs.

Summary Of Decision

[11] The following summarises the decision of this court:

(a) **Purported misuse of the sinking fund.** Based on a proper construction of s. 46 of the Strata Titles Act 1985, no special resolution was required for the use or application of the sinking fund. Although a special resolution is required to determine the portion of the contribution of the management fees that is to be applied to the special account, no special resolution is required in order for the funds in the special account to be used to defray expenses.

Accordingly, the plaintiff's claim for the sums to be repaid to the management corporation was dismissed;

(b) **Common property.** I found that all the facilities located outside the parcels and which were capable of being used in common by more than one parcel owner to be common property. These included the cooling tower, toilets and lifts in Crest Tower. The management corporation was thus obligated to maintain such common property.

The first to eighth defendants' defence of estoppel failed on the facts.

The court therefore:

(i) ordered a mandatory injunction for the management corporation and its council members for the time being to undertake the maintenance and management of such common property;

(ii) granted a declaration to the effect that the management corporation was obligated to maintain all common property at 3TwoSquare including, without limitation, the lifts, the toilets located in the lift lobbies of Crest Tower, the central cooling tower at Crest Tower and the common property located in the carpark; and

(iii) allowed the plaintiff's claim for special damages in connection with the costs incurred in maintaining the central cooling tower and the toilets in Crest Tower;

(c) **The personal liability of the council members.** I found that:

(i) even though the council members do owe a fiduciary duty to the management corporation and to the proprietors as a whole, this duty is not owed to any individual proprietor. The plaintiff's claim for breach of fiduciary duty against the defendants was thus dismissed; and

(ii) on the facts, it was not proven that the defendants were personally liable to the plaintiff for the breach of statutory duties by the management corporation, and the plaintiff's claim in this regard was dismissed accordingly.

As a consequence of the dismissal of the claim against the second to ninth defendants, the claim against the third party was also dismissed;

(d) **Loss of rental.** I found that:

(i) the plaintiff failed to prove that the carpark flooding issue was attributable to a failure by the management corporation to maintain the carpark premises;

(ii) the plaintiff did prove that, on balance, there had been a failure to maintain the lifts in Crest Tower to an acceptable standard, and that this responsibility lay with the management corporation;

(iii) one of the tenants of the plaintiff, Novartis Corporation Malaysia Sdn Bhd, had refusal renewal of its tenancy due to the problems associated with the flooded carpark and the frequent breakdown of the lifts at Crest Tower; and

(iv) the loss of Tune Talk as a tenant was not proven, as the testimony on this point was merely hearsay.

As the management corporation was only partially responsible for the loss of Novartis as a tenant, I determined its contribution at 30% and allowed the claim for special damages in part only; and

(e) **General damages.** I allowed the plaintiff's claim for general damages and directed that assessment be conducted before me for the costs incurred by the plaintiff in undertaking the rewiring of Crest Tower as well as the electricity charges incurred by the plaintiff in respect of the common property in Crest Tower.

[12] These findings are explained in further detail in the following paragraphs.

Alleged Misuse Of The Sinking Fund

[13] The plaintiff contended that the defendants had misused the sinking fund of the management corporation in undertaking certain maintenance and repair works at 3TwoSquare. These works included matters such as the installation of lift locking mechanisms, installation of closed-circuit television cameras, waterproofing works and electric calibration works. The total cost of such works was RM249,634. The plaintiff contended that these expenditures were not approved by a special resolution at a general meeting of the management corporation but were instead approved at weekly meetings attended by some of the council members. The plaintiff thus sought for the money that had been utilised for these works to be repaid to the management corporation by the second to ninth defendants.

[14] In my judgment, based on a proper construction of s. 46 of the Strata Titles Act 1985, a special resolution of a management corporation is not required for the use or application of the sinking fund. Even though a special resolution is required to determine the portion of the contribution of the management fee that is to be applied to the special account, no special resolution is required in order for the funds in the special account to be used to defray expenses.

[15] Although s. 46 of the Strata Titles Act 1985 has since been repealed by the Strata Titles (Amendment) Act 2013 with effect from 1 June 2015, that provision was still in force at the time of the commission of the acts complained of by the plaintiff.

[16] Section 46 provided as follows:

> Section 46. Special account.
>
> The management corporation shall maintain a special account in which shall be paid such portion of the contribution to the management fund as may be from time to time determined under paragraph (ba) of subsection (5) of section 41 by special resolution for the purposes of meeting its actual or expected liabilities in respect of the following matters:
>
> (a) for painting or repainting any part of the common property which is a building or other structure;

(b) for the acquisition of any movable property for use in relation with the common property;

(c) for the renewal or replacement of any fixtures or fittings comprised in any common property and any movable property vested in the body corporate; and

(d) for any other expenditure not being expenditure incurred under subsection 43(5) to meet a liability for maintenance or for settling any defaults in payment by a proprietor.

[17] Section 41 of the Strata Titles Act 1985 dealt with the duty of the original proprietor to convene the first annual general meeting of a management corporation. Section 41(5) imposed a requirement for the agenda of such meeting:

(5) The agenda for the first annual general meeting shall include the following matters:

(a) to decide whether to confirm, vary or extend insurances effected by the management corporation;

(b) to decide whether to confirm or vary any amounts determined as contributions to the management fund;

(ba) to determine the portion of contribution to the management fund to be paid into the special account to be maintained under section 46;

(c) to determine the number of members of the council and to elect the council where there are more than three proprietors;

(d) to decide whether to amend the additional by-laws in force immediately before the holding of the meeting; and

(e) to present the audited accounts of the management corporation.

[18] Although there is a reference to the requirement for a special resolution in s. 46, such special resolution is only required when the decision is made by the management corporation to determine the portion of the contribution to the management fund that is to be paid into the sinking fund maintained under s. 46. The plain words of s. 46 make this clear by referring to "such portion of the contribution to the management fund as may be from time to time determined under (s. 41(5)(ba)) by special resolution".

[19] The Strata Titles Act 1985 does not require any special resolution to be passed for the utilisation of the sinking fund. Once the proportion of the management fee to be contributed to the sinking fund has been determined, the management corporation would be free to utilise the sinking fund in any manner it considers fit, so long as the purposes for which the sinking fund was to be utilised came within the matters specified in sub-paras. (a) to (d) of s. 46.

[20] The facts of this case show that the plaintiff had written to the Commissioner of Buildings in October 2013 to complain regarding unauthorised use of the funds, which culminated in a reply from the management corporation to the Commissioner. This reply explained that the use of the sinking fund had been approved by the management corporation in its third annual general meeting held on 14 September 2013.

[21] At trial, the current chairman of the management corporation, Mr S Kumar (DW5), testified that the details regarding the use of the sinking fund had been included in the accounts that had been tabled at the third AGM. Although the accounts were not in evidence before the court, I saw no reason to disbelieve Mr Kumar's testimony, as I found him to be a reliable and forthright witness, who was genuinely concerned with resolving the issues faced by the management corporation. In my view, the fact that the accounts had been approved by the management corporation was sufficient to have constituted ratification of the expenditures incurred. (The alleged unauthorised use of the sinking fund occurred before the date of the third AGM.)

[22] For these reasons, the plaintiff's claim for the sums incurred out of the sinking fund to be repaid to the management corporation was dismissed.

[23] An important jurisprudential point arises in connection with the plaintiff's claim relating to the use of the sinking fund. The plaintiff did not itself seek to be reimbursed for the alleged misuse of the sinking fund, but was seeking for the sums to be repaid to the management corporation. It was thus taking action for the benefit of the management corporation against the office bearers in the council. The plaintiff's action relating to the sinking fund was akin to a derivative action in company law.

[24] The question thus arises whether a derivative action can be commenced by a proprietor in a management corporation established pursuant to the provisions of the Strata Titles Act 1985 against the officer bearers of the management corporation. It would seem to me that a common law right of derivative action may exist in such circumstances, although this is not a question that was required to be addressed in the present case, due to the fact that I have found that there has been no unauthorised use of the sinking fund.

[25] In summary, the plain words of the Strata Titles Act 1985 did not require that a special resolution be passed by a management corporation before the sinking fund may be used. The special resolution referenced in s. 46 relates to the apportioning of the contributions that must be applied towards the sinking fund. The determination of the specific proportion must have been approved by the management corporation in general meeting by

way of a special resolution. Once this has been done, the sinking fund may be utilised for the purposes set out in s. 46. No further special resolution would be necessary to approve the utilisation of such funds. On the facts of this case, the use of the funds has been ratified by the third AGM held in September 2013.

Common Property

The Background Relating To The Parties' Contentions

[26] A key issue affecting the determination of a substantial portion of the plaintiff's claim is the proper categorisation of certain facilities located in Crest Tower. These facilities include the central cooling tower, toilets and lifts. The parties dispute whether such facilities should be maintained by the management corporation, or whether the plaintiff, as the owner of the parcels located in Crest Tower, should bear the costs and expenses of operating and maintaining such facilities.

[27] The plaintiff's position was that these facilities are "common property" within the meaning of the Strata Titles Act 1985 and the Building and Common Property (Maintenance and Management) Act 2007. Because the responsibility to manage and maintain common property lies with the management corporation, the plaintiff contended that it was entitled to not only the costs that it had expended in maintaining the relevant facilities, but also to compel the management corporation to maintain such facilities.

[28] The utility of these facilities accrues substantially (even if not exclusively) to the occupiers of Crest Tower. For example, unlike Crest Tower, none of the other blocks in 3TwoSquare has central air-conditioning. The parcels in these other blocks are cooled by split air-conditioning units installed by the respective parcel owners within their own parcels. Thus, the costs of operation and maintenance of these split units fall to the respective parcel owners. By contrast, Crest Tower is installed with central air-conditioning, the costs of operating and maintenance of which are not insubstantial. The argument was advanced on behalf of the first to eighth defendants that it would not be fair to the parcel owners of the other blocks in 3TwoSquare to contribute to the costs of operation and maintenance of the centralised air-conditioning system in Crest Tower, since they do not benefit from or enjoy the central air-conditioning.

[29] A similar objection was raised in respect of the toilets located in Crest Tower. In the other blocks, most of the toilets are located within the parcels. By contrast, in Crest Tower, the toilets are mostly located outside the parcel units but within the confines of Crest Tower. Even though there would not be anything to prevent the Crest Tower toilets from being used by a person other than an occupier of the premises, the reality is that only the plaintiff, its tenants in Crest Tower, and their visitors would be likely to use these

toilets. Yet the owners of the parcels in the other blocks are required to effectively subsidise the plaintiff in cleaning and maintaining the Crest Tower toilets.

[30] The point that such an arrangement is unfair was well made. However, in the administration of justice, what is fair and what is right, following a proper consideration and application of legal principles, may not always perfectly coincide. Indeed, it is this very tension that has led to the development and evolution of the courts of chancery and the principles of equity. The first to eighth defendants have not sought to invoke the equitable jurisdiction of this court. In any event, it is arguable that it would be open to the courts to apply equitable principles in resolving disputes relating to strata titles and common property, which are in essence creatures of statute.

Analysis

[31] The obligation of the management corporation to maintain common property in a development area was set out in s. 43(1)(a) of the Strata Titles Act 1985, which provided as follows:

> Section 43. Duties and powers of management corporation.
>
> (1) The duties of the management corporation include the following:
>
> (a) to manage and properly maintain the common property and keep it in a state of good and serviceable repair;

[32] In the Strata Titles Act 1985, common property was defined in s. 4 as follows:

> "common property" means so much of the lot as is not comprised in any parcel (including any accessory parcel), or any provisional block as shown in an approved strata plan;

[33] The term common property was thus defined by way of exclusion in the Strata Titles Act 1985. At trial, evidence was received from Mr Wong Kim Hiong (DW3), the managing director of Clement Management Sdn Bhd, which was the managing agent of the management corporation, that the cooling tower for the centralised air-conditioning system in Crest Tower was not located on any parcel belonging to the plaintiff. Counsel for first to eighth defendants, Mr Silvarajoo, also conceded the fact that the toilets adjacent to the lift lobbies in Crest Tower were located in the area marked as "Lobi Lif" in the strata plans and hence outside the areas identified as parcels belonging to the plaintiff.

[34] Nonetheless, Mr Silvarajoo maintained that the relevant facilities were not common property. The reasons advanced were twofold.

[35] The first was that the strata plan did not specifically identify the relevant areas as common property, in that there was no label "common property" affixed in the plan. Reliance was placed on ss. 10(3) and 10(4) of the Strata Titles Act 1985, which counsel argued required common property to be clearly identified in the strata plan.

[36] In my judgment, this contention fails because the definition of "common property" in the Strata Titles Act 1985 defines it by exclusion: common property is simply that which is not a parcel. Accordingly, there is no need for there to have been labels affixed to the relevant areas to be designated as common property; all the areas that are not identified as parcels will automatically be regarded as common property.

[37] This is amplified by the fact that areas that are not the subject of the dispute, for example, the driveways in 3TwoSquare, have also not been affixed a label in the strata plan. Yet the management corporation did not seek to argue that they were not common property.

[38] Additionally, I was unable to accept counsel's argument because ss. 10(3) and 10(4) on their proper construction did not impose a requirement for common property to be specifically labelled in a strata plan before they may be considered to be common property. An examination of the whole of s. 10 will reveal that the requirement was imposed in respect of proposed strata plans submitted in connection with an application for subdivision. Thus, when an application for subdivision is made, the application must be accompanied by a proposed strata plan specifically identifying common property. Once approved, there is no requirement for the finalised strata plan to specifically identify common property before they may be regarded as such.

[39] Section 10 provided as follows:

> Section 10. Application for subdivision of building.
>
> (1) Any application for the approval of the Director for the subdivision of any building shall be made in writing in Form 1 to the Land Administrator and shall be accompanied by:
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> (a) such fee as may be prescribed;
>
> (b) a proposed strata plan comprising a location plan, and a storey plan in respect of each storey of each building, to be submitted in triplicate containing such details as are specified in subsections (2) and (3) respectively and certified by a land surveyor as follows:
>
> (i) that he has made a comparison of the plans to the original plans of the building prepared by the architect responsible for its construction; and
>
> (ii) in the case of a storey plan, that the boundaries of the parcels shown thereon follow features of permanent construction appearing in the building;

A (c) the certificates of a land surveyor or a registered architect, referred to in paragraphs (a) and (b) of section 9;

(d) all such written consents to the making of the application as are required under paragraph (f) of section 9; and

(e) subject to subsection (7), the issue document of title of the lot.

B (2) Every location plan shall:

(a) specify the number of the lot, the title number of the land comprised therein and the area thereof;

(b) delineate the boundaries and boundary marks of the lot and the C position of all buildings thereon, showing which of these buildings are to be subdivided;

(c) include a vertical section of each such building showing:

(i) the floor and ceiling of each storey; and

D (ii) the height of each storey;

(d) include a legend end the vertical section and dimensions of each building or part thereof, proposed to be erected within the lot as a separate tenement or an extension of any completed subdivided building in accordance with the building plans approved by the planning authority; and

E (e) contain such other details as may be prescribed.

(3) Every storey plan shall:

(a) specify the number of the lot and the title number of the land comprised therein, and the building and numbered storey thereof to F which the plan relates;

(b) delineate, subject to the provisions of paragraphs (a) and (b) of subsection (5), each proposed parcel and define the boundaries thereof by reference to floors and walls showing the horizontal dimensions, without it being necessary to show the bearing;

G (c) indicate in respect of each such parcel the number by which it is described in Form 1;

(d) specify the approximate floor area of each parcel;

(e) distinguish such parts as are not to be included in any of the parcels H but are to become part of common property;

(f) delineate the external boundaries and show the horizontal dimensions without it being necessary to show any bearing of each building or parts thereof to be erected within the lot as a separate tenement or an extension of any completed buildings in accordance with the building plans (if any) approved by the planning authority; I and

(g) contain such other details as may be prescribed.

(4) Every proposed strata plan shall show a legend of– A

(a) all parcels;

(b) all common property;

(c) all accessory parcels, and specify therein the parcels they are made appurtenant to, irrespective of whether the accessory parcels are contiguous to those specified parcels; and B

(d) a provisional block, if any.

(5) Where an accessory parcel:

(a) consists of a building or parts thereof and is bounded by external walls, floors and ceilings, the dimensions and boundaries of such accessory parcel shall be shown in the proposed strata plan in accordance with the requirements of subsections (2) and (3); C

(b) does not consist of a building or parts thereof:

(i) the external boundaries of the accessory parcel shall be ascertained from the building plans approved by the planning authority, and the accessory parcel shall be up to a reasonable height or to the extent of any projection above or encroachment below ground level by another part of the lot; and D

(ii) the proposed strata plan shall show a diagram of the accessory parcel with similar dimensions as those shown on the approved plans mentioned in subparagraph (i). E

(6) Every proposed strata plan shall:

(a) show the proposed share units in whole numbers of each parcel and the total share units of all the parcels, and in the case of any provisional block the quantum of provisional share units shall similarly be shown therein for the provisional block; and F

(b) contain such other particulars as may be prescribed by rules made under section 81.

(7) An application under subsection (1) may be submitted without the issue document of title to the lot if that document is in the hands of any person as chargee or lien-holder, and in any such case, the application shall be accompanied by a copy of a request by the proprietor served on that person for the production of the document at the Land Office within fourteen days of the date thereof. G

(8) Upon receipt of any application under subsection (1), the Land Administrator shall endorse or cause to be endorsed, a note of the making thereof on the register document of title and shall then refer the application to the Director of Survey. H

(9) The Director of Survey shall thereupon check the location and storey plans and carry out or cause to be carried out such survey of the land, any of the buildings thereon or any of the parcels as he may consider desirable, and shall: I

A (a) advise the Land Administrator as to whether the plans are in order;

(b) notify the Land Administrator of the amount of fees to be collected upon approval of the application in respect of such survey; and

(c) notify the Land Administrator of the amount of fees to be collected in respect of the plans caused to be prepared in the event of the
B approval of the application.

(10) The Land Administrator shall thereupon if he is satisfied that the application and the other documents presented therewith are in order, transmit them to the Directors together with his recommendations for approval or rejection:

C

Provided that no application shall be so transmitted without the issue document of the lot and accordingly in a case falling within subsection (7), if that document is not duly produced at the Land Office, the Land Administrator shall, if unable to secure its production, prepare or cause to be prepared, title in continuation (or where appropriate, a duplicate issue
D document of title only) under Chapter 3 of Part Ten of the National Land Code [Act 56/65] as if the circumstances were as specified in paragraph (c) of subsection (1) of section 166 of the Code.

[40] Section 10 has been reproduced *in extenso* to illustrate the fact that it dealt primarily with the application process for a subdivision of a master
E title.

[41] The second argument advanced for the management corporation was that, because the chiller and toilet facilities in Crest Tower were for the exclusive use of the plaintiff and its tenants in Crest Tower, such facilities cannot be considered common property. The plaintiff and other occupants
F of Crest Tower, it was argued, had "special use" of these facilities, and thus the facilities cannot be considered to be property that was capable of being used in common with the other proprietors in 3TwoSquare.

[42] I am unable to agree, for the following reasons:

G (a) this contention is not supported by the provisions of the Strata Titles Act 1985 nor that of other relevant statutes applicable at the material time. Nowhere is the concept of exclusive or special use provided for in the relevant legislation. As we have seen, the Strata Titles Act 1985 simply provides that which is not a parcel is common property; and

H (b) this conclusion is unaffected even if reference is made to the definition of "common property" in the Building and Common Property (Maintenance and Management) Act 2007. This Act deals with, *inter alia*, the obligation of a joint management body, before coming into existence of a management corporation. Although it is not *in stricto sensu*
I applicable to determine the scope of the duties of a management corporation, I am of the view that resort may be had to its provisions to understand how the same concepts have been defined in the various Acts of Parliament.

Section 2 of this Act provides, in the definition of "common property": A

> "common property", in relation to a development area, means so much of the development area as is not comprised in any parcel, such as the structural elements of the building, stairs, stairways, fire escapes, entrances and exits, corridors, lobbies, fixtures and fittings, lifts, refuse chutes, refuse bins, compounds, drains, water B tanks, sewers, pipes, wires, cables and ducts that serve more than one parcel, the exterior of all common parts of the building, playing fields and recreational areas, driveways, car parks and parking areas, open spaces, landscape areas, walls and fences, and all other facilities and installations and any part of the land used or capable of being used or enjoyed in common by all the occupiers of the C building;

This definition was considered in the case of *JMB Silverpark Sdn Bhd v. Silverpark Sdn Bhd*[1]. The High Court found that, for the purposes of the Building and Common Property (Maintenance and Management) Act 2007, two requirements need be fulfilled in order for an area to be D considered to be common property: the area must be outside a parcel, and must be used or capable of being used or enjoyed in common by all occupiers of the building. The court held:

> In the textbook, *Strata Title in Singapore and Malaysia* 3rd edition, Lexis Nexis 2009 by Professor Teo Keang Sood, regarding what E constitutes "common property" in a strata development, he stated:
>
> > From the above definition of common property in BMSMA, it is clear that to amount to common property, two requirements must be satisfied: the first is that such part of the land and building concerned must not be F comprised in any lot or proposed lot, and second that the part concerned must be used or capable of being used or enjoyed by occupiers of two or more lots or proposed lots. These two requirements are conjunctive, such that satisfying one without the other would not suffice ... .
>
> The definition of "common property" in the BCP is more detailed than the one in the statutory SPA in that it includes more parts of the Development as common property but in substance the two definitions are similar in the requirement for the two limbs to be fulfilled, as discussed by Professor Teo Keang Sood in his book *(supra)*. Therefore, it can be safely concluded that the Clubhouse H is a common property under the BCP.

The question therefore is whether the facilities that are the subject matter of the dispute in this case are "capable of being used or enjoyed in common by all the occupiers in the building". I am of the view that the answer to this must be in the affirmative. Even though the plaintiff in I the present case is the only proprietor of all the parcels in Crest Tower,

A the definition refers to "occupiers" rather than "proprietor". Thus, as long as the facility in question is capable of being enjoyed by the employees of the plaintiff and, say, the tenants of the plaintiff in Crest Tower, then such facilities must be considered common property.

B In addition, the fact that the plaintiff is the only proprietor of Crest Tower is simply circumstance. There is nothing to prevent the plaintiff from selling any one or more of its parcels to a third party. If it does so, the facilities such as the centralised air-conditioning, as well as the lifts and toilets located at Crest Tower, would be capable being used by that third party as well as the plaintiff's employees, agents and tenants.

C In my view, the proper categorisation of a facility as common property cannot depend on the identity of the proprietor in question, as an absurd result will arise of the facility is not considered common property on one day (and thus need not be maintained by the management corporation) but would be considered common property once the

D proprietor sells one of his parcels to a third party. It is well-established that the court may favour an interpretation of statute that does not lead to an absurd result: see the *dicta* of Denning MR in *Northman v. Barnet London Borough Council*[2], as applied by the Federal Court recently in *Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v. Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor*[3].

E

Conclusion

[43] The Strata Titles Act 1985 defines common property by way of exclusion: that which is not a parcel would be common property. As the cooling tower, the Crest Tower toilets, the windows and façade of Crest

F Tower and the landscaped areas surrounding Crest Tower are all located outside areas that have been identified as parcels in the strata plan, these all must comprise the common property in 3Twosquare. The Building and Common Property (Maintenance and Management) Act 2007 does not strictly apply where a management corporation has come into existence, but

G even here the definition of common property speaks of the area that is not comprised within a parcel and which is used or capable of being used or enjoyed in common by all the occupiers in the building. This definition also supports the construction that the relevant facilities ought to be considered as part of the common property.

H **[44]** Accordingly, the responsibility for the maintenance and upkeep of these facilities should fall on the management corporation.

I

Estoppel

[45] Learned counsel for the first to eighth defendants raised the defence of estoppel. It was contended that, because the plaintiff had itself voluntarily undertaken the responsibility for maintaining the centralised air-conditioning system and the cleaning of the toilets in Crest Tower, the management corporation was thus discharged and absolved from its obligation to undertake the management and maintenance of such facilities. In other words, by voluntarily undertaking such maintenance itself, the plaintiff – contended Mr Silvarajoo – was now prevented from denying that those facilities were not part of the common property in 3TwoSquare.

[46] On the threshold issue whether estoppel has been pleaded: although the specific word "estoppel" was not used in the first to eighth's defendants' re-amended statement of defence, I was satisfied that the basic facts supporting the contention of estoppel has been sufficiently set out in paras. 11(b) and (c) of the defence, where it was stated that the plaintiff had not objected to undertaking the maintenance of the central air-conditioning system and the toilets in Crest Tower. I do not consider it necessary for the defence to have further stated that the plaintiff cannot now resile from this position, as these paragraphs made it clear that an answer was called for from the plaintiff. There can be no contention that the plaintiff was taken by surprise by Mr Silvarajoo raising estoppel after the trial concluded. Indeed, the issue of estoppel was in fact discussed between the court and counsel on the third day of trial[4]. No objection appeared to have been raised by counsel for the plaintiff at that time.

[47] The following passage from the English decision of *Crossco No 4 Unlimited and Others v. Jolan Ltd and Others*[5] sets out a modern formulation of the doctrine of promissory estoppel:

> The essential principle can be summarised as follows: where by his words or conduct one party to a transaction ("D") freely makes to the other ("C") a clear and unequivocal promise or assurance which is intended to affect the legal relations between them (whether contractual or otherwise) or was reasonably understood by C to have that effect, and, before it is withdrawn, C acts upon it, altering his position so that it would be inequitable to permit D to withdraw the promise or assurance, D will not be permitted to act inconsistently with it. C must also show that the promise or assurance was intended to be binding in the sense that (judged on an objective basis) it was intended to affect the legal relationship between the parties and that D either knew or could have reasonably foreseen that C would act on it. C's conduct need not derive its origin solely from the D's promise or assurance. The principal issue is whether D's promise or assurance had a sufficiently material influence on C's conduct to make it inequitable for D to depart from it.

[48] The question was thus whether the plaintiff's action in undertaking the maintenance of the relevant facilities amounted to a clear and unequivocal promise or assurance to the management corporation that the latter need no longer undertake such services, and whether there had been an alteration of position by the management corporation that would make it inequitable for the plaintiff to now state that such responsibility lay with the management corporation.

[49] The objective facts show that the plaintiff was presented with a *fait accompli*. In January 2013, the plaintiff was given notices that the management corporation was going to terminate the cleaning services to the Crest Tower toilets. The plaintiff thus had no choice but to have itself undertaken the cleaning and maintenance, or else it would have been faced with increasingly disgruntled tenants. I agree with the observation of counsel for the plaintiff, that the fact that this suit was commenced not too long after October 2013 showed that the plaintiff had not accepted the position that the Management Company was not obligated to undertake the maintenance of the toilet facilities at Crest Tower. On the contrary, the objective facts establish that the plaintiff had undertaken the maintenance under protest. Having done so, I cannot see how it can be claimed that they are now prevented by estoppel from compelling the Management Company from complying with its statutory duties to, among others, maintain the toilets at Crest Tower.

[50] Similar considerations apply in connection with the electricity and maintenance costs of the centralised air-conditioning system. The first to eighth defendants' position was that the plaintiff, through Mr Eric Yong, had agreed to install electricity sub-meters to directly measure the energy consumption at Crest Tower. The reason for the sub-meters was so that the plaintiff would make payment directly to Tenaga Nasional Berhad for the energy consumption at Crest Tower. Mr Wong Kim Hiong (DW3), the managing director of Clements Management Sdn Bhd, testified at trial that Mr Eric Yong had not indicated any reluctance at all at the proposal put forward for the installation of the separate sub-meters. Clements was the managing agent for 3TwoSquare at the material time.

[51] I could not accept DW3's testimony. The real issue was the responsibility for the expenses incurred in operating and maintaining the centralised air-conditioning system, and not the installation of the sub-meters *per se*. It can be seen that, as early as 25 January 2013, Mr Eric Yong had informed the council that the issue of the termination of the service contracts for the maintenance of the centralised air-conditioning system was a matter on which he was seeking legal advice from solicitors[6]. This, in my view, had the effect of the plaintiff reserving its position on the matter, and cannot by any stretch of the imagination give rise to an estoppel against the plaintiff.

[52] Of course, the reason for the installation of the sub-meters was so that the plaintiff would be directly responsible for all electricity consumption at Crest Tower. The minutes of the third annual general meeting of the management corporation showed that a resolution was passed to compel the plaintiff to install the sub-meters for the centralised air-conditioning system. If the plaintiff had voluntarily agreed to pay for the operating and maintenance costs of the centralised air-conditioning system, it would not have been necessary for such a resolution to have been passed. The mere fact that such a resolution was even tabled goes to show that there is no question of the management corporation having been led to believe by the conduct of the plaintiff that the latter had absolved the management corporation from its obligation to bear the operating and maintenance costs of the air-conditioning system.

[53] Accordingly, based on an evaluation of the contemporaneous documentary evidence, the issue of the electricity charges and other maintenance costs associated with the centralised air-conditioning was still very much a live issue between the parties right up to the time this suit was commenced. For this reason, there was no question of the management corporation having been led by the plaintiff to believe that it was absolved from the responsibility for such charges. The defence of estoppel thus failed.

Whether An Injunction Lay Against The Management Corporation

[54] The management corporation is an entity with separate legal personality and has the capacity to sue and to be sued: see s. 39(2), (2A) and (3) of the Strata Titles Act 1985. Section 55(2) further provided:

> Where a requirement or duty is imposed on the management corporation by this Part, any person for whose benefit, or the benefit of whose parcel that requirement or duty is imposed on the management corporation, may apply to a court of competent jurisdiction for an order compelling the management corporation to carry out that requirement or perform that duty, as the case may be, and on such an application being made, the court may make such order as it thinks proper.

[55] The duties of a management corporation were specified in s. 43(1) of the Strata Titles Act 1985. This section appeared in Part VII of the Act. Section 55 appeared in the same part. The duty that was the subject of the plaintiff's claim is the duty to maintain the common property. Under s. 34(1)(b), the plaintiff has the rights of user over the common property as though it was a co-proprietor of the common property. As such, the plaintiff has sufficient *locus* to apply to court for an order compelling the management corporation to perform its duty to maintain the common property. This is because the plaintiff is the beneficiary of the obligation imposed under

s. 43(1)(a) by virtue of its rights of user and deemed co-proprietorship. In addition, the plain words in s. 55(2) make it clear that the court was entitled to grant the injunctive relief prayed for by the plaintiff.

[56] For these reasons, I was unable to accept the contention by Mr Silvarajoo that the management corporation is a public authority and that a mandatory injunction will not lie against it as it would amount to an interference with the performance of its statutory duties. The specific authority relied upon by learned counsel was not concerned with the legal personality of a management corporation under the Strata Titles Act 1985, but rather with that of a joint management body[7]. I was also of the view that the allegation that the plaintiff had not come to court with clean hands had not been made out.

[57] I therefore granted the mandatory injunction in favour of the plaintiff against the management corporation and its council members for the time being to undertake the management and maintenance of the common property. I also granted a declaration in favour of the plaintiff that the management corporation was obligated to maintain all common property at 3TwoSquare including, without limitation, the lifts, the toilets located in the common area of Crest Tower, the central cooling tower at Crest Tower and the common area located in the carpark.

[58] In relation to the plaintiff's claim for maintenance costs:

(a) I allowed the plaintiff's claim for the costs that it had incurred in maintaining the central cooling tower, as well as for the costs that the plaintiff would continue to incur in undertaking such maintenance, until such time as the management corporation takes over the maintenance function; and

(b) similarly, I allowed the plaintiff's claim for the costs previously incurred in maintaining the toilets located in the common area of Crest Tower, as well as costs that it would continue to incur in undertaking such maintenance until such maintenance is taken over by the management corporation.

[59] I noted that the plaintiff had abandoned its claim for the costs that it had incurred in maintaining the carpark and other common areas in Crest Tower.

Breach Of Statutory And Fiduciary Duties By Council Members

[60] The plaintiff in this case not only sought to make the management corporation liable in respect of its failure to have maintained the common property, but has also sought to make the council members of the management corporation personally liable to the plaintiff. The plaintiff contended that the individual council members owed a duty to the plaintiff under statute, and also owed fiduciary duties to the plaintiff.

[61] I deal first with the issue of the incidence and extent of fiduciary duties of a council member of a management corporation.

Council Members As Fiduciaries

[62] There does not appear to be any legal precedent on the question of whether the council members of a management corporation established pursuant to the Strata Titles Act 1985 owe a fiduciary duty to the corporation. Furthermore, unlike in the case of companies (which provides for the duties of directors by codifying, with modifications, common law principles), the enabling legislation does not specifically provide for the scope and extent of the duties of council members.

[63] Section 39(4) of the Strata Titles Act 1985 provided as follows:

> (4) The management corporation shall elect a council which, subject to any restriction imposed or direction given by the management corporation at a general meeting, shall perform the management corporation's duties and conduct the management corporation's business on its behalf, and may for that purpose exercise any of the management corporation's powers.

[64] The Second Schedule of the Strata Titles Act 1985 provided for matters such as the constitution of the council as well as the proceedings of council meetings and the general meeting of a management corporation.

[65] In the case of a company, both at common law and under a statute, a director of the company has a duty to act *bona fide* in the best interests of the company. A director must also act for a proper purpose, which means that may not subordinate the interests of the company to his own personal interests.

[66] Counsel for the plaintiff cited examples of other jurisdictions where the fiduciary duty of office bearers in a corporation that manages stratified property have been held to be co-extensive with the duty owed by directors of companies. I would, however, preface any comparative law discussion with the observation that the decisions in these other jurisdictions are clearly at best only of persuasive value, and that the legal position in Malaysia must of course take into account local circumstances, and be consonant with the context of the local legislation.

[67] In Australia, the Court of Appeal of New South Wales in the case of *2 Elizabeth Bay Road Pty Ltd v. The Owners – Strata Plan No 73943*[8] held:

> The analogy with a board of directors of a company is clear but incomplete. While members of the executive committee no doubt owe a fiduciary and other general law duties to the owners corporation in the same way as directors owe such duties to their company, the executive committee is not the repository of powers and functions distinct from

A those exercisable by the owners corporation through the action of its corporators assembled at a meeting. The two decision-making bodies have corresponding decision-making powers, except to the extent that matters expressly put by the legislation within the province of the owners corporation in general meeting (or that a general meeting has reserved exclusively to itself) are, by s. 21(2) excluded from the authority of the
B executive committee.

[68] The observation of the Court of Appeal in *2 Elizabeth Bay* is apposite. Unlike in a company, where the management of the company would typically be vested in the board of directors, with the company in general meeting vested with specific powers by statute, in an owners corporation,
C whatever powers that may be exercised by the corporators in general meeting may be exercised by the executive committee, and *vice versa*. The exception is specific matters that statute must be exercised by the corporation in general meeting.

D **[69]** In the case of *Re Steel and the Conveyancing (Strata Titles) Act 1961*[9], the Supreme Court of New South Wales suggested that council member in an owners corporation may even have a higher duty than company directors. The relevant passage bears setting out in full:

Such persons are at least in a position analogous to company directors;
E they may even have a higher fiduciary duty, and when they are promoters as well this duty has a dual basis. It is plain that the respondents have failed to recognise that it is their duty to manage the affairs of the body corporate for the benefit of all the lot holders, and that the exercise of any of their powers in circumstance which might suggest a conflict of interest and duty requires them to justify their conduct, and that the onus
F lies on them to prove affirmatively that they have not acted in their own interests or for their own benefit.

[70] The New South Wales position is thus that the council members of an owners corporation owes not only a fiduciary duty of good faith and care, but also that they owe a duty of loyalty, which requires them not to allow
G any conflict to arise between their duty to the corporation and their own personal interests. A further important point of law is made in the quoted passage: once the basic facts of a disputed transaction have been established, the evidential burden lies on the fiduciary to prove that there has been no conflict of interest and duty.

H **[71]** Learned counsel for the plaintiff also referred the court to the legal position in Sri Lanka. In the textbook *Understanding the Concept of Condominiums: A Handbook on the Law & Practice based on Apartment Ownership Law of Sri Lanka* by Ajithaa Edirimane, it was stated:

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The Council of a management corporation is similar to a Board of Directors of a Company. In certain States of the USA, the Council is, in fact, referred to as an Association Board. Similar to a Board, the Council of a management corporation too functions in a fiduciary capacity.

Accordingly, a Council in fulfilling its fiduciary duties owes the management corporation:

(1) a duty of loyalty; and

(2) a duty of care

Duty of loyalty – To ensure that there are no conflicts between one's self interest and his or her functions in directing the affairs of the Council.

Duty of care – To perform his or her duties in good faith, in the manner he or she believes to be in the best interest of the management corporation and with such care as "an ordinary prudent person in a like a position would use under similar circumstances", that is the 'business judgment rule'.

The business judgment rule will protect the Council Members if it can be established that they have acted 'in good faith' taking into account all the factors that surround the matter and that they personally believed the decision arrived at is in the best interest of the condominium owners and the management corporation, as a whole.

[72] In Ontario, the courts have recognised that the board of a condominium corporation is entitled to the benefit of the business judgment rule, in the same way that directors of for-profit corporations may not be held liable for decisions that were fairly and reasonably made, even if the decision turned out to be the wrong one with the benefit of hindsight.

[73] In the case of *3716724 Canada Inc. v. Carleton Condominium Corporation No 375*[10], the Ontario Court of Appeal held:

[50] While the business judgment rule was developed in the context of for-profit businesses, it has been applied to not-for-profit corporations as well: see, for example, *Hadjor v. Homes First Society*, 2010 ONSC 1589, 70 B.L.R. (4th) 101, at paras. 47-52. And courts in other jurisdictions have applied the rule when reviewing decisions rendered by condominium boards: see, for example, *Yusin v. Saddle Lakes Home Owners Ass'n*, 73 A.D.3d 1168 (N.Y. App. Div. 2010); and *Black v. Fox Hills N. Cmty. Ass'n*, 599 A.2d 1228 (Md. Ct. Spec. App. 1992).

[51] Moreover, the rationale underlying the business judgment rule in the corporate law context is also applicable to condominium corporations. As representatives elected by the unit owners, the directors of these corporations are better placed to make judgments about their interests and to balance the competing interests engaged than are the courts. For

A instance, in this case the security concerns arose in part as a result of the condominium's location, and the Board members' knowledge of that area is clearly an advantage that they enjoy over any court subsequently reviewing their decision.

[52] The Act provides that the directors are the ones responsible for
B managing the affairs of a condominium corporation: s. 27(1). They are also required to act honestly and in good faith, and to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances: s. 37(1). Like their counterparts in corporate statues, these provisions suggest that courts should be careful not to usurp the functions of the boards of condominium corporations.

C **[74]** In my judgment, full reliance ought not be placed on this Ontario decision for the present purposes because under the Ontario Condominium Act 1998, the relevant Minister has the power to introduce competency criteria for directors of a condominium corporation. There were no such prequalification criteria applicable in Malaysia for the election of council
D members.

The Position In Malaysia Under The Strata Titles Act 1985

[75] The essential distinction between a typical company incorporated under the Companies Act 2016 (or under its predecessor legislation) and a
E management corporation established pursuant to s. 39(1) of the Strata Titles Act 1985 is that the latter has not been formed for the purposes of pursuing a particular venture or economic activity. A management corporation exists simply as a repository of rights that are common to all the proprietors in a development. Even though a proprietor does not (and cannot) own common
F property, he has a usufruct over it, by virtue of s. 34(1)(b):

Section 34. Rights of proprietor in his parcel and common property.

(1) Subject to this section and other provisions of this Act, a proprietor shall have:

G (a) in relation to his parcel (in the case of a parcel proprietor) the powers conferred by the National Land Code on a proprietor in relation to his land; and

(b) in relation to the common property, the right of user which he would have if he and the other proprietors were co-proprietors thereof.

H **[76]** As explained at para. 31 *ante*, one of the responsibilities of a management corporation under s. 43(1) is to manage and properly maintain the common property and keep it in a state of good and serviceable repair. Reading these two provisions together, it stands to reason that, because all the proprietors in a development have a right of use of the common property
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as though they were co-proprietors in the common property, the duty of the management corporation under s. 43(1) must be owed to all the proprietors collectively.

[77] The management corporation, not being a natural person, can only act by way of a resolution passed in general meeting or through its agents. Its agents would primarily be the council and the individual members to whom a power or duty may have been delegated in accordance with item 5 of the Second Schedule, as well as any person who is employed as an agent or servant of the corporation pursuant to item 6 of such Schedule. Accordingly, the council's duty, like that of the management corporation, must also be owed to all the proprietors collectively. So too would be the duty of the individual council members.

[78] Having reviewed the cases cited by counsel for the plaintiff and considered the scope and context of the Strata Titles Act 1985, I am of the view that council members of a management corporation do owe a fiduciary duty to the corporation and to the proprietors collectively. However, this duty is not co-extensive as the duty that is owed by a director to the company of which he or she is a director.

[79] At first blush, there may appear to be much attraction in the proposition that a council member owes his or her fiduciary duties to each and every proprietor. A case could be made that, because the sole function of a management corporation is to protect and advance the interests of the proprietors, any one proprietor who is aggrieved by the actions of a council member may seek to make him or her personally liable for the losses that may be suffered by that proprietor.

[80] However, I am unable to accept this argument, as the existence of such a duty would place too great a strain on council members. It will be remembered that a management corporation is not a for-profit enterprise that seeks to undertake a venture or activity for commercial gain. Its role is a more conservatory one, concerned primarily with the preservation and upkeep of assets in the common interest of all the proprietors. In performing the duties and functions of the management corporation, it would be unduly burdensome for the council members to be accountable to individual proprietors. While council members may validly take into account the rights and interests of individual proprietors and weigh them against the rights and interests of the collective, council members should be free to make a decision that they consider in good faith to be in the interests of the proprietors as a whole, even if that decision may be unfavourable or less favourable to the interests of one or a minority of proprietors. If such a duty is owed directly to each individual proprietor, the council would be paralysed into inaction,

with the threat of litigation from individual proprietors imposing a debilitating inertia on their ability to make reasoned decisions in favour of the management corporation and the proprietors as a whole.

[81] There is another significant way in which a management corporation differs from a company incorporated to pursue a commercial venture. In a for-profit corporation, the principal criteria utilised for the selection and appointment of directors would be their skill and experience. Directors can be chosen from the vast universe of persons who are not disqualified from acting as a director. By contrast, by virtue of item 2 of the Second Schedule, council members are cast from much smaller pool of candidates: the proprietors of the parcels located in the development area. As such, it would not be appropriate in my view for council members to be held to such a high standard of care as would be owed by a professional director in a company.

[82] The pre-qualification of council members – that they be proprietors – raises a further point. A council member, as explained above, would owe a fiduciary duty to management corporation and to the proprietors as a whole. At the same time, he or she would not be a council member but for the fact that he or she owns a parcel within the relevant development area. That is the *sine qua non* for election to office. It would be apparent to the reasonable observer that the office of a council member is not one that is held for monetary gain, but rather to advance the interests of the management company, and in so doing advancing that council member's personal interest in the collective in his or her capacity as a proprietor. Thus, a council member would always have a personal interest to advance, as he or she must necessarily also be a proprietor.

[83] Given such a context, I am of the view that it would not be appropriate to import wholesale company law principles that a director cannot put himself or herself into a position where his or her personal interests would conflict with the duty owed to the company. I would accept that, where a council member is exercising a power or duty delegated to him or her, then he or she should not make a decision that benefits himself or herself personally to the detriment of the management corporation or the proprietors as a whole. In addition, where the council member has a personal interest (which arises other than by reason of the council member's interest as a proprietor of a parcel) in a transaction or undertaking that is being contemplated in a meeting of the council or of the management corporation in general meeting, then that council member must disclose that personal interest at such meetings. Having done so, he or she would be free to vote in that meeting in any way he or she considers fit, including in way that would subordinate the interests of the management corporation to the council member's personal interest.

[84] I sum up the applicable principles as follows:

(a) A council member of a management corporation owes a fiduciary duty to act *bona fide* in the interests of the management corporation.

(b) This duty is owed to the management corporation and to the proprietors comprised in the development managed by the corporation.

(c) This fiduciary duty is not, however, owed to individual proprietors.

(d) The nature of the fiduciary duty includes:

(i) a duty to exercise due care and skill, having regard to the particular skill and experience of the council member in question;

(ii) a duty of fidelity or loyalty that requires the council member:

(1) not to exercise a delegated power to advance a personal interest to the detriment of the management corporation or the proprietors as a whole;

(2) to disclose any personal interest (arising other than by way of proprietorship in a parcel) that he or she may have in any transaction or undertaking proposed to be carried out by the management corporation.

Once such interest is disclosed, the council member would be free to exercise his or her vote in any way he or she considers fit at any council meeting or at a general meeting of the management corporation. In particular, the council member would be free to exercise his or her voting rights at such meetings to advance a personal interest that he or she may have in his or her capacity as a proprietor, and to suborn the interests of the collective to his or her personal interests.

[85] Counsel for the plaintiff in submissions referred the court to the case of *Alcatel-Lucent (Malaysia) Sdn Bhd v. Solid Investments Ltd & Another Appeal*[11], as an authority for the scope of the duties of a fiduciary. In this case, it was held:

> [21] A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. The distinguishing obligation of fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary, (see *Bristol and West Building Society v. Mothew* [1996] 4 All ER 698, the English Court of Appeal).

[86] With respect, learned counsel has overlooked the basic principle that the scope of the duties undertaken by a fiduciary will depend on the precise nature of the relationship between the fiduciary and the principal. Thus, the fiduciary duties imposed on a solicitor in a solicitor-client relationship will differ from the fiduciary obligations owed by a director to the company of which he or she is a director, even if there may be certain duties that would be common to both categories. The label "fiduciary" does not come with a standardised bundle of obligations that apply in all cases; the incidence and scope of the duties of a fiduciary will vary with each category of fiduciary, and the categories of fiduciaries are not closed.

[87] It will only be necessary to recall the words of Gopal Sri Ram JCA in *Tengku Abdullah Ibni Sultan Abu Bakar & Ors v. Mohd Latiff Shah Mohd & Ors And Other Appeals*[12]:

> Because of the way in which the jurisprudence on the subject has developed, it is unsurprising to find that Parliament and judges have declined to define a fiduciary relationship and thereby to demarcate its parameters. In the case of the legislature, the nearest attempt to a definition of the relationship is to be found in s. 2 of the Specific Relief Act 1950, which defines 'trust' and 'trustee' as follows:
>
> > 'trust' includes every species of express, implied, or constructive fiduciary ownership;
> >
> > 'trustee' includes every person holding, expressly, by implication or constructively, a fiduciary character.
>
> Judicial restraint in attempting a definition is exemplified by the following remark of Frankfurter J in *Securities & Exchange Commission v. Chenery Corp* (1943) 318 US 80 at p 85:
>
> > To say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?
>
> The flexible approach adopted by the courts when according recognition to a particular relationship as being fiduciary in nature is, of course, one of judicial impression dependent upon the fact pattern of a given case. Flexibility of approach is the hallmark of equity, for when we deal with the principles governing equitable intervention, we enter a domain comprising not rigid rules but broad and liberal doctrines that are aimed at achieving a just result according to the facts of a particular case.

> Equity has, in keeping with the purpose of its origin, therefore refrained from laying down any strict rules for determining whether a particular relationship is fiduciary in nature or gives rise to fiduciary obligations, leaving the development of its jurisprudence to a case by case basis. The maxim 'the categories of fiduciary relations are never closed' exemplifies the approach that a court of equity adopts in this sphere of human activity. See *English v. Dedham Vale Properties Ltd* [1978] 1 All ER 382.

[88] It is for these reasons that the duties set out in para. 83 *ante* do not exactly conform to, or are not co-extensive with, the fiduciary duties of a director.

The Application Of The Principles To The Facts

[89] The plaintiff sought to make the council members of the management corporation personally liable to the plaintiff for breach of their fiduciary duties. I am of the view that, because the fiduciary duties of the council members are owed to the management corporation and to the proprietors collectively but not to the individual proprietors of parcels in 3TwoSquare, the plaintiff's claim against the second to the ninth defendants for breach of fiduciary duties failed on a point of law. By the same token, the first to the eighth defendants' claim against the third party, Mr Eric Yong, was also dismissed, insofar as an indemnity was sought against the third party for breach of fiduciary duties.

Breach Of Statutory Duty

[90] As I have held the management corporation to be in breach of its statutory duty to maintain the common property in accordance with s. 43(1)(a) of the Strata Titles Act 1985, the next issue was whether the council members, being the second to the ninth defendants, can be held personally liable for this breach.

[91] In my judgment, no liability will arise in connection with the exercise of a duty or function of a management corporation by its council member, for as long the council member acts in good faith in what he or she considers to be in the best interests of the proprietors as a whole.

[92] Based on the facts of this case, I am of the view that, on balance, a case has not been made out that the council members in question had acted for an improper purpose.

[93] The maintenance and management of 3TwoSquare had been originally undertaken by the plaintiff, as the developer of the project. Subsequently, with the establishment of the joint management body in August 2008, the plaintiff was appointed as the managing agent, thus continuing in its role to manage and maintain the property. This arrangement remained even after the

formation of the management corporation in April 2009. In July 2012, however, the plaintiff was terminated as the managing agent, and replaced by Clements Management Sdn Bhd.

[94] As mentioned above, the managing director of Clements, Mr Wong Kim Hiong (DW3), gave testimony at trial. Upon Clements assuming the role as managing agent, DW3 found that about 40% of the total maintenance charges collected from the proprietors in 3TwoSquare went towards payment of electricity charges incurred in respect of the common property in the development. This was, in his own words, an abnormality.

[95] DW3 advised the council members of the management corporation that the chiller and cooling tower in Crest Tower used for the centralised air-conditioning system did not form part of the common property[13]. As we have seen at para. 42 above, I have held that this view was misplaced.

[96] Acting upon this advice, the management corporation acted to terminate the services of the maintenance providers for the centralised air-conditioning system in January 2013, which meant that, since that date, the plaintiff has been maintaining the chiller and cooling tower for the air-conditioning system at its own cost. A resolution was also passed in a general meeting of the management corporation to compel the plaintiff to install its own sub-meters at Crest Tower, effectively requiring the plaintiff to pay the operating costs of the air-conditioning system.

[97] I was not satisfied that liability lay against the council members personally for the failure by the management corporation to carry out its statutory duty to maintain the common property. In the circumstances and based on facts of the case as I have narrated in the preceding paragraphs, the council members cannot be faulted for having relied on the advice of the managing agent. There was insufficient evidence to show that the council members had acted other than in good faith for what they considered to be in the best interests of the proprietors as a whole.

[98] If the cost-sharing arrangement were considered without the benefit of a legal analysis of what constituted common property, it was perhaps understandable that the council may have viewed the arrangement as being unfair, as it effectively meant that the rest of the proprietors were paying for a utility from which they accrued no benefit. This view may have coloured their actions in causing the management corporation to act in breach of its statutory obligations. Nevertheless, the apparent unfairness of the arrangement when viewed superficially lends support to my finding that the council members had acted honestly in what they considered to be in the common interest of the proprietors.

[99] As the plaintiff's claim to make the council members personally liable for the breach by the management corporation was dismissed, it follows that the first to eighth defendants' claim against the third party must also be dismissed, as it was premised on an indemnity.

The Claim For Loss Of Rental

[100] The plaintiff claimed damages for the loss of rental income arising from the loss of a tenant and another potential tenant. It was contended that the failure by the defendants to adequately maintain the carpark and the lifts had directly resulted in such loss.

The Problem Of The Flooded Carpark

[101] It was common ground that the basement carpark in 3TwoSquare suffered from chronic ponding. It was also not in dispute that, although the carpark lots were owned by the plaintiff, the driveways in the carpark and all the other areas between the individual carpark lots were part of the common property.

[102] The plaintiff contended that the flooding in the carpark was a result of the failure on the part of the management corporation to adequately maintain the premises, including to maintain the sump pumps located in the carpark.

[103] The position of the first to eighth defendants, by contrast, was that the flooding in the carparks was the consequence of defective works, and not a maintenance failure.

[104] Mr Eric Yong, the third party (and, it will be recalled, who is also a director of the plaintiff) testified that the plaintiff had sued Integral Concrete Technology (M) Sdn Bhd, the waterproofing specialist that had undertaken the waterproofing works in the basement carpark during the construction and development of 3TwoSquare. A dispute had arisen between them relating to such works, and the plaintiff and Integral Concrete Technology entered into a consent judgment on a without admission of liability basis to settle the claim. Subsequent to the consent judgment, waterproofing works had been carried out in the basement carpark.

[105] I was of the view that, on balance, the plaintiff failed to prove that the carpark flooding issue was attributable to a failure by the management corporation to adequately maintain the carpark premises. I was of the view that the evidence was inconclusive as to whether the ponding problems were caused by a design or construction defect, or by a failure to properly maintain the basement carpark.

The Problem With The Lifts

[106] In respect of the lifts in Crest Tower, the first to eighth defendants' position was that firstly these lifts did not form part of the common property, and secondly, in any event, the management corporation had adequately maintained them.

[107] In relation to the first issue, I had made the determination that the lifts were indeed common property, and thus the responsibility for their maintenance lay with the management corporation. The remaining issue was thus whether the management corporation had in fact undertaken adequate maintenance of the lifts.

[108] I am of the view that, based on an objective evaluation of the available evidence, the lifts in Crest Tower had not been maintained to a reasonable or even adequate standard.

[109] At trial, Ms Mastura Kamaruddin (PW5) gave evidence on an incident involving a malfunctioning lift at Crest Tower that had caused her to suffer injuries. Ms Mastura was an employee of Celcom, a tenant at Crest Tower at the material time. At about 6.30pm on 25 March 2015, she had pressed the lift button to call the lift car. When the lift door opened, she stepped into the lift car, without realising that the lift car had stopped below the level of the floor on Level 5. As a result, she fell into the lift car and suffered a tear to the medial collateral ligament in her right knee.

[110] The first to eighth defendants adduced documents at trial to show that it had engaged Sigma Elevator (M) Sdn Bhd to undertake servicing and maintenance of the lifts at Crest Tower. However, these very documents show that there had been numerous malfunctions with the lifts (including stuck and overshooting lift cars) that Sigma had to address within a relatively short period of time in March 2014. Sigma had also been engaged to be on standby between 7.30am and 8.30am and between 5.30pm and 6.30pm on certain weekdays in March 2014, in order to address any breakdown in the lifts during these peak periods.

[111] The first to eighth defendants also adduced the certificates of fitness issued by Jabatan Keselamatan dan Kesihatan Pekerjaan in respect of the lifts at Crest Tower, to establish that the lifts had undergone regulatory inspections. Under cross-examination, Mr Lee Yee Hoe (DW2), a service operations manager at Sigma, explained that the certificates relate only to the safety equipment employed in the lift systems, and not to the functionality of the lifts.

[112] Having reviewed all the evidence adduced at trial, I was satisfied that there had been a failure to maintain the lifts to an acceptable standard. As I have held in para. 42 *ante*, this responsibility lay with the management corporation.

The Claim In Respect Of Novartis

[113] The plaintiff claimed damages against the defendants for losses incurred by the refusal by Novartis Corporation Malaysia Sdn Bhd to renew its tenancy agreement with the plaintiff. At trial, the plaintiff called Steven Kong (PW2), the Key Account Manager at Novartis, who testified that Novartis had moved out of the Crest Tower due to the problems associated with the flooded carpark and the frequent breakdown of the lifts at Crest Tower. I saw no reason to disbelieve his testimony.

[114] As it was not proven that the flooding in the carpark was attributable to any failure by the management corporation to maintain the carpark areas in the basement, I allowed only a part of the plaintiff's claim for loss of rental. I ascertained that the conduct of the management corporation only partly contributed to the loss of Novartis as a tenant, by reason of the failure to adequately maintain the lifts in Crest Tower. I determined the management corporation's contribution at 30%.

[115] I was also of the view that the plaintiff would have been under a duty to mitigate its loss and could have itself paid for the maintenance of the lifts, and so I allowed the claim only in respect of six months' loss of rental.

The Claim For Loss Of Carpark Rental

[116] The plaintiff claimed damages for the loss of income arising from the loss of the tenancies for reserved parking lots as a consequence of the non-renewal of the Novartis tenancy. I allowed the claim in part, on the same bases as stated in paras. 113 and 114.

The Claim In Respect Of Tune Talk

[117] The plaintiff claimed that a prospective tenant, Tune Talk had signed a letter of offer for a tenancy in Crest Tower, but had subsequently retracted it. Ms Rachaelle Yong (PW1), the legal manager of the plaintiff, testified that Tune Talk became aware of the dispute between the plaintiff and the management corporation regarding the lack of maintenance to the facilities in Crest Tower, and had decided not to proceed with the tenancy because of this.

[118] I was of the view that Ms Yong's testimony on this point was hearsay and therefore inadmissible for the purposes of proving the contention of the plaintiff. The testimony from Mr Goh Sin Huat (PW3) was similarly inadmissible.

[119] As the plaintiff's contention was not proven, I dismissed the claim for loss of rental arising from Tune Talk's failure to proceed with a tenancy in Crest Tower.

Costs

[120] Having found for the plaintiff for a part of its claims, I awarded costs for both the plaintiff and Mr Eric Yong, the third party, against the management corporation. I ordered that these costs were to be paid out of a special fund to be collected from among all the parcel owners in 3TwoSquare but excluding the plaintiff.

[121] In subsequent stay proceedings, counsel for the first to eighth defendants (who were not counsel having conduct of trial) argued that the court was not empowered to make such an order. Counsel relied on s. 143 of the Strata Management Act 2013.

[122] In reply, Ms Celine Chelladurai argued that s. 78 of the Strata Titles Act 1985, though repealed by the time the judgment was pronounced on 22 June 2017, continued to apply to permit such an order being made.

[123] Section 78 of the Strata Titles Act 1985 provided as follows:

> Section 78. Costs in proceedings by proprietors against management corporation.
>
> (1) In any proceedings brought by one or more proprietors against the management corporation, a court of competent jurisdiction may order that any moneys (including costs) payable by the management corporation pursuant to an order of the court made in those proceedings shall be paid, only in respect of such parcels as are specified in the order and in such proportions as may be so specified, by the management corporation out of contributions levied for the purpose.
>
> (2) Where the court makes an order under subsection (1), the management corporation shall, for the purposes of paying the moneys ordered to be paid by it, levy contributions in accordance with the terms of the order, and pay the moneys out of the contributions paid pursuant to that levy.

[124] Section 78 permitted the court to make an order that a successful plaintiff need not contribute to costs awarded to that plaintiff. In my judgment, because s. 78 of the Strata Titles Act 1985 has been repealed, it cannot have any further application after 1 June 2015. The rights of the plaintiff and the third party to the costs of the proceedings had not yet accrued by the time the Strata Titles (Amendment) Act 2013 came into force. As such, any order of costs made after 1 June 2015 must necessarily be governed by the new law, being s. 143 of the Strata Management Act 2013.

[125] Section 143 of the Strata Management Act 2013 provides as follows: A

Section 143. Representation in proceedings

(1) Notwithstanding any other written law:

(a) in any proceedings by or against the joint management body, management corporation or subsidiary management corporation; or B

(b) in any other proceedings in which the joint management body, management corporation or subsidiary management corporation is required or permitted by the court to be represented, or to be heard, or is otherwise entitled to be represented or to be heard, C

any person authorised by the joint management body, management corporation or subsidiary management corporation for that purpose may, on behalf of the joint management body, management corporation or subsidiary management corporation, institute such proceedings or appear in such proceedings and may make all appearances and applications and do all acts in respect of the proceedings on behalf of the joint D management body, management corporation or subsidiary management corporation.

(2) Where all or some of the parcel owners or proprietors of the parcels in a development area:

(a) are jointly entitled to take proceedings for or with respect to the common property in that development area against any person or are liable to have such proceedings taken against them jointly; or E

(b) are jointly entitled to take proceedings for or with respect to any limited common property in that development area against any person or are liable to have such proceedings taken against them F jointly,

the proceedings may be taken:

(A) in the case of paragraph (2)(a), by or against the joint management body or management corporation; or

(B) in the case of paragraph (2)(b), the subsidiary management G corporation constituted for that limited common property,

as if the joint management body, management corporation or subsidiary management corporation, as the case may be, were the parcel owners or the proprietors of the parcels concerned. H

(3) Any judgment or order given or made in favour of or against the joint management body, management corporation or subsidiary management corporation, as the case may be, in any proceedings referred to in subsection (2) shall have effect as if it were a judgment or an order given or made in favour of or against the parcel owners or the proprietors, as the case may be. I

A (4) Where a parcel owner or proprietor is liable to make a contribution to another parcel owner or proprietor, as the case may be, in respect of a judgment debt arising under a judgment referred to in subsection (3), the amount of that contribution shall bear to the judgment debt:

(a) in the case of a judgment or an order for or against a joint
B management body or management corporation, the same proportion as the allocated share units or share units of the parcel of the first-mentioned parcel owner or proprietor bears to the aggregate share units; or

(b) in the case of a judgment or an order for or against a subsidiary
C management corporation, the same proportion as calculated in accordance with section 65.

[126] Section 143(4)(a) prescribes the manner in which a proprietor is liable to make contributions where another proprietor has successfully obtained judgment against the management corporation. By s. 143(3), the judgment
D against the management corporation takes effect as though it was a judgment against the proprietors personally. The proportion of contribution is determined based on the proportion of share units held by a proprietor as a fraction of the total share units in the development area.

[127] Where a judgment specifies an amount of cost to be paid by the
E management corporation, if the share units held by the successful plaintiff are not first deducted from the aggregate share units before the proportion of contributions are determined, the result will be that a successful plaintiff would never be able to recover the full amount of costs awarded. A simple example will serve to illustrate the point.

F **[128]** A proprietor who owns half of all the share units in a development successfully obtains judgment against the management corporation, and the court grants him RM100,000 as costs. If there are five other proprietors in the development who each hold 10% of the share units, using the literal construction of s. 143(4)(a), each of these other proprietors will have to
G contribute RM10,000 towards the costs, meaning that the judgment creditor proprietor would only obtain RM50,000 out of his total award of costs.

[129] This, in my view, could not have been the intent of Parliament.

[130] It is well-established that the court may depart from a strict reading of a statute where such a literal interpretation would lead to an absurd result:
H see the authorities previously cited at para. 42(b) *ante*.

I

[131] In my view, it would be an absurd result that a proprietor who successfully obtains judgment against a management corporation would never be able to obtain the full amount of his costs. I am, therefore, of the view that the court is entitled, as a matter of its judicial discretion to be exercised where the justice of the case so demands, to deduct from the aggregate share units, the share units held by the successful plaintiff, before determining the proportionate contributions of the remaining proprietors.

[132] Accordingly, I am of the view that the order granted for costs was not *ultra vires* the Strata Management Act 2013, based on a proper construction of s. 143.

Endnotes:

1. [2012] 1 LNS 1082; [2013] 9 MLJ 714.
2. [1978] 1 WLR 220.
3. [2017] 4 CLJ 265; [2017] 3 AMR 340; [2017] 4 MLRA 298.
4. See p. 18 of the notes of evidence for 3 December 2015.
5. [2011] EWHC 803 (Ch) 6.
6. see B2/104 at para. 6.5.
7. *Sandanatavan Marimuthu & Anor v. Badan Pengurusan Bersama – PV3; TSS Security Services Sdn Bhd (Third Party)* [2015] 2 CLJ 844; [2015] 3 AMR 789.
8. [2014] NSWCA 409.
9. (1968) 88 WN Pt 1 NSW 467.
10. 2016 ONCA 650.
11. [2013] 2 CLJ 734; [2012] 4 MLJ 72; [2012] 2 MLRA 731.
12. [1997] 2 CLJ 607; [1996] 2 AMR 2633; [1996] 2 MLJ 265; [1996] 2 MLRA 563.
13. See Q & A 21 of WS-D3, read together with p. 28 of the notes of evidence for 29 April 2016 .